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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

SUNNY HILL FARMS DAIRY CO., INC.,
Petitioner,

v.

CLIFFORD HARDIN, Secretary of Agriculture,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Sunny Hill Farms Dairy Co., Inc., the petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above cause on August 25, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 446 F. 2d 1124, is reprinted in Appendix A hereto. The judgment of the Court of Appeals, filed on August 25, 1971, is reprinted in Appendix B. The Memorandum Opinion of the United States District Court for the Eastern District of Missouri, Southeastern Division, reported at 307 F. Supp. 392, is reprinted in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 25, 1971. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May the Secretary of Agriculture, under §8(c) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §608c), require a single milk handler in one marketing area to pay all producers 15 cents more per hundredweight for his milk than all other handlers are required to pay for identical milk, not because of a difference in cost or an economic benefit provided by the producers, but primarily to provide "alignment" with milk prices in neighboring marketing areas?

2. Does the Secretary of Agriculture have authority to impose a "market differential" on one milk handler within a milk marketing area because of that handler's history of paying a premium for his milk, when such premium was based not upon cost factors, but upon the use which the handler made of the milk?

3. Under this Court's ruling in **Zuber v. Allen**, 396 U.S. 168 (1969), may a "location differential" or a "market differential" in a federal milk marketing order be based on factors other than the cost of producing and supplying the milk?

4. Does the imposition by the Secretary of Agriculture of a price differential against one milk handler covered by a milk marketing order, which makes it economically impracticable for him to compete in the primary market within the marketing area, constitute an illegal economic trade barrier, as proscribed by 7 U.S.C. §608c(5)(G) and **Lehigh Valley Cooperative Farmers v. United States**, 370 U.S. 76 (1962), particularly where it is based primarily upon prices in adjacent areas covered by different marketing orders?

STATUTES INVOLVED

This case involves the construction and interpretation of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. §601 *et seq.*, the relevant portions of which are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner is a small, independent dairy owning and operating a milk processing plant in Cape Girardeau, Missouri, 120 miles south of St. Louis. Prior to February 2, 1965, the Cape Girardeau area was not regulated under any federal milk marketing order. Petitioner purchases most of its supply of raw milk from farmers located in Cape Girardeau County, processes it into fluid milk and other dairy products, and sells 69% of such milk and milk products in the area covered by the present St. Louis marketing order. Such sales are made either to retailers or to ultimate consumers, in competition with other dairies.

Respondent, the Secretary of Agriculture,* is authorized by the Agricultural Marketing Agreement Act (the "Act") to fix the minimum price to be paid for milk and milk products to producers (farmers) by milk handlers (processing dairies) within a certain marketing area. In so fixing these prices, the Secretary is bound by the provisions of §608c(5)(A) that:

> "Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

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* On November 11, 1971, after this petition had been printed in proof form, the named respondent, Clifford Hardin, resigned as Secretary of Agriculture. His successor has not assumed office as of the date of the filing hereof but will be duly substituted when confirmed. Mr. Hardin was a party to this action only in official capacity, and his resignation does not affect the issues presented or the rights of the parties. See Fed. R. Civ. P. 25(d); Sup. Ct. Rule 48(3).

In June 1963, hearings were held by the Secretary on a proposal to include Cape Girardeau County and several other Missouri counties in the St. Louis marketing area. In May 1964, the Department of Agriculture issued a "recommended decision" in which such Missouri counties were included in the St. Louis marketing area, and further proposed that handlers in the newly included counties pay the same price for milk as the St. Louis handlers. Following the receipt of exceptions from interested parties (none of which exceptions or parties were made known to petitioner), the Department, on November 5, 1964, issued its final decision which modified the recommended decision and imposed an additional 15-cent per hundredweight differential above the minimum price for all milk purchased by handlers in three southern Missouri counties, including Cape Girardeau. Petitioner is the only handler in those three counties.

Respondent sought to justify this treatment of petitioner by calling it a "location differential." However, the final Order provided that the minimum price for milk should be **decreased** by 16 cents for plants 30-40 miles outside of St. Louis and by one cent for each 10 miles thereafter. This would have resulted in a "minus" differential of 22 cents to petitioner and, allowing for transportation costs, would have allowed petitioner to compete in the "core" of the area—the city and county of St. Louis. However, in response to arguments that a "plus" differential should be imposed upon petitioner, which proponents argued would be "necessary for price alignment for markets in Kentucky, Tennessee and Arkansas," the respondent, in his final order, created Cape Girardeau as a separate basing point and, instead of a differential of minus 22 cents per cwt., imposed a plus 15 cents differential upon petitioner.[1] Because of the prices in adjoining

[1] Section 1062.52 (7 C.F.R. § 1062.52) of the Order is reproduced in Appendix E hereto. This section has been slightly

areas, the Secretary found that milk has a "location value" in Cape Girardeau higher than that in St. Louis.

Respondent also made some attempt to categorize the adjustment as a "market differential" under the Act because of the fact that petitioner had historically paid a premium for its milk.[2] This premium was paid, however, because of petitioner's desire to obtain 100% Class I (fluid milk) usage. It thus bought only enough milk to fill its Class I needs, thus requiring the producers to find other buyers for their surplus milk.

After living with the Secretary's order for one year and incurring substantial losses, petitioner attacked the order in an administrative proceeding under § 608c(15)(A). Following a hearing before the Department of Agriculture, the Order was sustained, the Hearing Examiner holding as follows:

> "The Assistant Secretary found that milk in the three-county area in question has a higher value than milk in St. Louis, that the differential would provide better alignment of prices between the St. Louis order and other orders in adjacent marketing areas, and that the Cape Girardeau handler (petitioner) customarily paid his producers about 15 cents more than the minimum prices applicable at St. Louis (Finding 8). Accordingly, the differential is authorized not only as a location adjustment but also as a 'market differential customarily applied' in the Cape Girardeau area."

After exhausting its administrative remedies, petitioner filed this action for review in the District Court under

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modified since 1965, but the changes have no bearing on the issues presented by this petition, and Sunny Hill is still the only handler required to pay the 15 cent differential.

[2] No attempt was made by the Secretary to justify the differential as "incidental to, and not inconsistent with" the remainder of the Order, under § 608c(7)(D).

§ 608c(15)(B), seeking a declaration that the differential was invalid as a matter of law. The district court found that "the final decision of November 5th is primarily designed to properly align the St. Louis marketing area and areas to the south and to account for the fact that before regulation Sunny Hill had paid producers about 15 cents per hundred-weight above the minimum price." 307 F. Supp. at 397. The court therefore held the order to be illegal and discriminatory against the petitioner and entered summary judgment for petitioner, reasoning that the differential imposed against petitioner could not qualify as either a location or a market differential because it is not based upon cost but upon extraneous factors not properly within carefully delineated exceptions authorized by Congress. The court said, l.c. 400:

> "There is no rational basis for singling out plaintiff as the only handler in the entire marketing area to be a buffer between marketing areas when it is undisputed that 69% of its sales are in the St. Louis marketing area."

In view of the disposition of the case by the district court, no ruling was made on Sunny Hill's contention that the differential constituted an illegal trade barrier proscribed by § 608c(5)(G).

On appeal by the Secretary, the Eighth Circuit, acknowledging the facts to be as stated by the district court, reversed and ordered summary judgment to be entered for respondent. The Court of Appeals held that the Secretary had sustained his burden of establishing that the differential was appropriate to accomplish the "broad purposes" of the Act and that the differential was properly based upon the "location value" of milk in Cape Girardeau and the historical pricing practices. The court did not deem it necessary to analyze whether the differ-

ential was based on cost factors or whether it reflected economic benefits rendered by the producer. The Court of Appeals also rejected petitioner's contention that the differential constituted an economic trade barrier prohibited by § 608c(5)(G).

REASONS FOR GRANTING THE WRIT

This case presents important questions of far-reaching significance to the entire dairy industry involving renewed and persistent efforts by the Secretary of Agriculture to expand and exceed the narrowly drawn price-fixing powers granted to him by Congress in the Agricultural Marketing Agreement Act of 1937.

This Court, in **Zuber v. Allen**, 396 U.S. 168, 183 (1969), observed that the Act "does not contain a mandate phrased in broad and permissive terms," but rather that, as regards variations from the standard minimum prices, "'Congress has spoken with particularity and provided specifically enumerated differentials.'" The Court further held that "the permissible adjustments are limited to compensation for rendering an economic service." *Id.* at 188.

Nevertheless, the Secretary here, in the purported exercise of the powers ceded to him by Congress, has departed from the statutory mandate that "prices shall be uniform as to all handlers" and has singled out petitioner for special and discriminatory treatment. This has been accomplished under the guise of a so-called "location" or "market" differential imposed upon petitioner, based not upon legitimate criteria but rather to provide "alignment" between various marketing orders. This practice, as sanctioned by the Eighth Circuit, could have the effect of destroying the entire concept of price uniformity decreed by Congress and could result in wholesale circumvention of the statutory guidelines.

A brief outline of the federal milk marketing regulatory scheme—aptly characterized as a "labyrinth" by Mr. Justice Harlan[3]—is necessary to an understanding of the

[3] **Zuber v. Allen**, *supra* at 172.

questions involved in this case and their importance. Basically, the Secretary is authorized to create "marketing areas" and to set minimum prices to be paid to the producers (farmers) by all handlers (dairies) within those areas. Although there are two basic uses for milk—fluid milk (Class I) and, less profitably, as an ingredient in non-fluid products such as butter and cheese (Class II)—the statute provides that farmers shall be paid a uniform price for all milk purchased, based on average utilization in the industry, regardless of the use to which it is put by the individual purchasing handler. Adjustments are made among handlers based on their own respective actual usage of milk purchased. The handler, therefore, is required to pay to a "producer settlement fund" a premium if his production of fluid milk exceeds the average. Conversely, he is reimbursed by the pool if more than the normal amount of his milk is used for Class II, or non-fluid, purposes.[4]

The present regulatory scheme is a result of the crisis visited upon by farmers in the 1920's because of price instability and seasonal fluctuations. The first Congressional attempt at regulation of the industry was jeopardized by the ruling of this Court in **Schechter Poultry Corp. v. United States**, 295 U.S. 495 (1935), which prohibited overbroad administrative delegation. The present statute was drafted in 1937 and, in order to satisfy the demands of **Schechter**, the Secretary's discretion was sharply circumscribed.[5] Section 8c(5)(A), although authorizing

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[4] A more detailed analysis of the mechanics of marketing orders is contained in **H. P. Hood & Sons v. United States**, 307 U.S. 588, 593-94 (1939); see also **Zuber v. Allen**, *supra* at 177 *et seq.*

[5] Perhaps because of the uniquely anti-competitive nature of the Act and the massive economic power reposed in the Secretary, milk price regulation has been the subject of scrutiny by this Court on many occasions. See e.g. **H. P. Hood & Sons v. United States**, 307 U.S. 588 (1939); **United States v. Rock**

the fixing of minimum prices for all handlers within a marketing area, specifically provides that:

> "such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handler subject to such order, (2) the grade or quality of milk purchased, and, (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

A given milk marketing order is required to contain the terms and conditions specified in §8c(5) **and no others.** It has been repeatedly held that the enumerated differentials in §8c(5)(A) are the only authorized adjustments to the minimum price and that such differentials can only be validly imposed if they "compensate or reward a producer for providing an economic service of benefit to the handler." **Zuber v. Allen,** *supra,* at 184; **Brannan v. Stark,** 342 U.S. 451 (1952); **Fairmont Foods Company v. Hardin,** 422 F. 2d 762 (D.C. Cir. 1971).

In the present case, despite previous findings in the "recomended decision" of the Secretary that there was no basis for differentiating between handlers in Cape Girardeau and St. Louis, the Secretary nonetheless ultimately imposed a 15 cent surcharge per hundredweight against petitioner, reasoning that because of the prevailing prices in areas adjacent to Cape Girardeau, milk had a "higher location value" in Cape Girardeau.[6] This dif-

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Royal Co-op., 307 U.S. 533 (1939); **Brannan v. Stark,** 342 U.S. 451 (1952); **Lehigh Valley Cooperative Farmers v. United States,** 370 U.S. 76 (1962); **Polar Ice Cream & Creamery Co. v. Andrews,** 375 U.S. 361 (1964); **Zuber v. Allen,** 396 U.S. 168 (1969).

[6] Nowhere in the Act is there any reference whatever to "location value." In **Brannan v. Stark,** 342 U.S. 451, 465 (1952), the Court held that "without support in the words of the statute, the challenged provision must fall."

ferential is applicable to **all** milk purchased by petitioner, even though most of it is purchased from suppliers in Cape Girardeau County and 69% of it is sold within the St. Louis marketing area. The Secretary made no attempt to establish an increased cost to the producers upon which the differential could be based, but rather attempted to justify the adjustment by reason of a need to "align" the southern portion of the St. Louis marketing area with the prices established in Arkansas and in the Paducah and Memphis areas.[7]

The differential involved in this case is precisely the type of forbidden adjustment which was recently stricken down by the Court of Appeals for the District of Columbia Circuit in **Fairmont Foods v. Hardin**, 442 F. 2d 762 (D.C. Cir. 1971), where the Court, following **Zuber v. Allen**, acknowledged that the authority for differentials was extremely limited and that they can only be justified to "compensate or reward the producer for providing an economic service for the benefit of the handler." The Court further held that a **mere difference in location**, which is relied upon here by the Secretary, is not sufficient reason to require one handler to pay higher prices than another governed by the same order. "There still must be some relation between the price differential and economic benefit." 442 F. 2d at 767, fn. 23.

In the **Fairmont** case the Secretary had argued that it was necessary to impose higher prices in the western portion of the area covered by the Nebraska and Western Iowa Order because of need to align the prices in that geographical area with those in the adjoining Colorado

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[7] The arbitrariness of the Secretary's treatment of petitioner is further manifested by the fact that a differential of **minus** ten cents then prevailed in Illinois immediately across the Mississippi River from Cape Girardeau, an area obviously much closer to petitioner's plant than Arkansas (65 miles), Paducah (40 miles) or Memphis (120 miles).

marketing area. The Court found no statutory justification for such alignment.

Similarly, in the present case, although petitioner sells 69% of its milk in the St. Louis marketing area, it is required to pay an extra 15 cents per hundredweight on all milk purchased because some of it is sold in neighboring areas. Besides being unsupported by statutory authority, such an order is inequitable and, as pointed out by the Court in **Fairmont**, any "alignment" that may be necessary can be covered by amendments to orders covering such neighboring areas.

The Secretary also sought to rationalize the differential by pointing out that petitioner had paid a 15 cent premium (over the blend price, not the Class I price) to some producers in the past. The reason for this payment, however, was that petitioner used the milk solely for Class I purposes (fluid milk) and thus the producers were unable to dispose of their surplus. As stated by the District Court (307 F. Supp. at 398):

> "Prior to being regulated Sunny Hill sought to obtain 100% Class I usage, and bought only enough milk from its producers to fill its requirements for Class I usage. Sunny Hill's producers had to find other outlets for their surplus milk. For that reason, Sunny Hill paid its producers a premium on the milk it bought for Class I usage."

Insofar as this adjustment is attempted to be justified as a "market differential," it is likewise unsupported by the statute, for in **Zuber v. Allen**, *supra*, at 188, this Court held that market differentials, like the other differentials authorized by the Act, may only be based upon **cost** adjustments. In no event, can the **use** of the milk by the handler be employed to justify a differential paid to the producer. In **Blair v. Freeman**, 370 F. 2d 229, 237 (D.C. Cir. 1966), the court said:

> "We hold that, irrespective of motive, the Act forbids consideration of the use to which the milk of a particular producer or class or producer is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers."

Moreover, the imposition of a plus differential on petitioner predicated upon prices outside the St. Louis area, irrespective of where the milk is to be sold, has effectively precluded petitioner from competing in St. Louis and St. Louis County, in violation of § 608c(5)(G), which provides that:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The instant case is even more aggravated than **Lehigh Valley Cooperative Farmers, Inc. v. United States**, 370 U.S. 76 (1962), where the Court invalidated, as illegal trade barriers, certain compensatory payments imposed upon outside handlers seeking to sell milk within a regulated area. Here, petitioner—an "inside" handler—is required to pay a premium on milk sold **within the same area** merely because of his geographical proximity to an outside area. One of the primary purposes of establishing a marketing area should be to allow all handlers to compete within that area on an equal basis. Yet here petitioner is foreclosed from competing in the primary market within the area. The Eighth Circuit's decision in this case cannot be reconciled with **Lehigh Valley** or with § 8c(5)(G).

The Eighth Circuit, in sanctioning the Secretary's departure from the letter of the statute, relied upon the

"broad purposes" of the Act, thereby disregarding this Court's holding in **Zuber**. As is evident from the **Fairmont** case, the Secretary has engaged in a wide-spread use of the "alignment" theory to impose differentials which are not based upon cost or other economic factors and are not therefore within the limited differentials authorized by the statute.[8]

If the judgment of the Eighth Circuit is permitted to stand unreviewed, the statutory requirement that the fixed prices "shall be uniform as to all handlers" will be routinely subverted by the Secretary and his successors, and the price of milk to a given handler will not be governed by the cost to the farmer of producing and supplying that milk but rather by the historical pricing structure prevailing in neighboring markets. Locale, in and of itself, will be sufficient justification for a differential.

This Court has frequently in the past recognized the necessity of the exercise of its certiorari power to maintain a proper balance in an industry as vital to the American health and economy as the dairy industry, and to confine within the statutory boundaries the attempted exercise by the Secretary of Agriculture of virtual life-and-death powers over handlers and producers alike.

This is another such case.

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[8] In addition to the Nebraska-Western Iowa Order invalidated in **Fairmont Foods v. Hardin**, *supra*, the Secretary, according to an *amicus curiae* brief filed on behalf of two farmers' cooperatives in support of the differential in the Court of Appeals, has invoked similar reasoning in almost every milk marketing order recently issued.

CONCLUSION

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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